

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HECTOR TORRES,

Defendant-Appellant.

UNPUBLISHED

June 19, 2008

No. 278070

Wayne Circuit Court

LC No. 06-008433-01

Before: Markey, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(ii), one count of second-degree criminal sexual conduct, MCL 750.520c(1)(b)(ii), and one count of third-degree criminal sexual conduct, MCL 750.520d(1).¹ Defendant was sentenced to 5 to 15 years' imprisonment for each of the counts, to be served concurrently. Defendant appeals by right. We affirm.

Defendant first argues that his rights to seat an impartial jury and to defend against the charges were violated when the trial judge limited defense counsel's questions during voir dire. A party must exhaust all peremptory challenges in order to preserve the issue of jury selection for appeal, unless the party objects or refuses to express satisfaction with the jury. *People v Taylor*, 195 Mich App 57, 59-60; 489 NW2d 99 (1992). Although defendant did not object to the jury that was ultimately selected, defense counsel did repeatedly express his disagreement with the trial judge's decision to disallow a particular question. Therefore, we review the conduct and scope of the voir dire by the applicable abuse of discretion standard. *People v Spears*, 250 Mich App 349, 351-352; 645 NW2d 718 (2002).

This Court must determine whether the trial court conducted a voir dire that was "sufficiently probing . . . to uncover potential juror bias." *People v Sawyer*, 215 Mich App 183, 187; 545 NW2d 6 (1996). We will not interfere with the trial court's discretion regarding voir

¹ Although the judgment of sentence for this conviction cites MCL 750.520d(1)(a) (victim between 13 and 16 years old), the parties tried this charge on the basis that culpability rested on MCL 750.520d(1)(d) because the victim was defendant's 16-year-old daughter at the time of the incident.

dire if it resulted in an outcome within the range of principled outcomes. See *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant's two daughters brought allegations of sexual misconduct against him. Defense counsel's theory at trial was that the girls fabricated these allegations because they were angry with defendant. During voir dire, the trial judge would not allow defense counsel to ask potential jurors whether they could contemplate reasons why young girls, whose father and mother had a strained relationship, may choose to fabricate allegations of sexual misconduct by their father. The trial judge explained that defense counsel could ask the jurors about being impartial, but could not ask them ultimate questions that may be part of evidence presented during the case. We believe this decision was properly within the range of principled outcomes.

Defense counsel was permitted to ask various other questions, including whether jurors had any involvement with sexual assault and/or ties to law enforcement officials. Moreover, the trial judge repeatedly asked potential jurors during the selection process whether they could be fair and impartial. In fact, the trial judge specifically explained to potential jurors that after hearing the evidence and the law, they must decide whether to believe the girls. Still, defendant argues that the prosecutor was given more leeway in his questioning of potential jurors. But this Court has held that a trial court did not abuse its discretion when allowing questions on voir dire designed to identify jurors who may find it inconceivable that someone would sexually abuse a child. *People v Dunham*, 220 Mich App 268, 270-271; 559 NW2d 360 (1996).

Given the questions asked and challenges exercised by defense counsel and the repeated inquiries into impartiality by the trial judge, we believe the voir dire at issue was sufficient to preserve defendant's right to a fair and impartial jury. The restrictions on voir dire did not have the effect of denying defendant his right to fully challenge potential jurors and defend against the charges.

Next, defendant argues the prosecutor engaged in misconduct by referring in his rebuttal to the "smoke and mirrors" of defendant's case. Because defendant did not timely object to the statement, we must review it as an unpreserved claim and apply the plain error standard. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). Reversal of unpreserved claims is only warranted when the alleged error resulted in an innocent person being convicted, or it seriously affected the fairness, integrity, or public reputation of the proceedings. *Id.*

After the "smoke and mirrors" statement, the prosecutor addressed the various arguments defendant presented. He explained the lack of medical reports, clarified discrepancies in where the girls were living at the time of the alleged incidents, illustrated a time line of events for the jury, and provided reasons why the girls should be believed.

A prosecutor's statements must be viewed as a whole, in light of defense counsel's arguments and their relationship to the evidence admitted. *People v Watson*, 245 Mich App 572, 586, 592-593; 629 NW2d 411 (2001). Furthermore, a prosecutor's arguments may be based on the evidence and any reasonable inferences arising from that evidence. *People v Ackerman*, 257 Mich App 434, 453-454; 669 NW2d 818 (2003). Here, the prosecutor's statements were properly based on the evidence and inferences that could be drawn from it. In fact, the statements were all made in response to the arguments defendant presented. When a defendant

advances alternative theories, it is proper for the prosecutor to comment on those theories. *People v Reid*, 233 Mich App 457, 478-479; 592 NW2d 767 (1999).

Next, defendant argues the prosecutor engaged in misconduct by making the following statement to the jury: “He fondled his own kids and if that doesn’t make you mad, if that doesn’t irritate the community, nothing will.” Defendant argues that this was tantamount to an impermissible civic duty argument, and it was made in an attempt to appeal to the juror’s sympathies. Again, defendant did not timely object to this statement; therefore, the plain error standard applies.

While it is true that a prosecutor may not ask jurors to convict a defendant as part of their civic duty, he may make arguments based on evidence and reasonable inferences. *Ackerman, supra* at 452-454. In addition, a prosecutor may “use emotional language during closing argument.” *Id.* at 454. Even assuming the prosecutor exceeded the bounds of propriety with respect to arguing a “civic duty,” the prosecutor’s comment was brief and could have been corrected by an objection and curative instruction. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because there was no objection, and a curative instruction would likely have cured any prejudice, reversal is not required. *Id.*; *Ackerman, supra* at 449-450. Moreover, any prejudice resulting from the prosecutor’s statements was alleviated by the judge’s must instruction to the jury that arguments of attorneys are not evidence and that the jurors not allow sympathy to influence their decision. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

Finally, defendant asserts that even if the errors committed by the prosecutor do not individually justify reversal, they cumulatively affected defendant’s right to a fair trial. We disagree. To reverse a judgment based on the cumulative error caused by prosecutorial misconduct, the effect of the error must be “seriously prejudicial in order to warrant a finding that defendant was denied a fair trial.” *Ackerman, supra* at 454. We cannot conclude that the statements when viewed in context and in light of the trial court’s instructions resulted in the conviction of an otherwise innocent person. In addition, we are not convinced that the fairness, integrity, or public reputation of judicial proceedings has been seriously affected. Defendant did not object to the statements when they were made, and the trial judge carefully cautioned the jurors regarding what they could properly consider when making their decision. Therefore, the prosecutor’s statements did not deny defendant his right to a fair trial and reversal is not warranted.

We affirm.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Kurtis T. Wilder